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No. PD-0254-18

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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CRAIG DOYAL

Appellees,

VS.

THE STATE OF TEXAS

Appellant.

ON DISCRETIONARY REVIEW FROM THE NINTH COURT OF APPEALS DISTRICT OF THE STATE OF TEXAS

CAUSE NO. 09-17-00123-CR

APPELLANT'S MOTION FOR REHEARING

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RECORD AND APPENDIX REFERENCES

All record and appendix items are cited as follows:

"CRD [page]"	Refers to the Clerk's Record in State v. Doyal.
"CRR [page]"	Refers to the Clerk's Record in State v. Riley.
"CRMD [page]"	Refers to the Clerk's Record in State v. Davenport.
"RR(2) [page] [line]"	Refers to the Reporter's Record Volume Two of March 29, 2017.
"RR(3) [page] [line]"	Refers to the Reporter's Record Volume Three of March 30, 2017.
"RR(4) [page] [line]"	Refers to the Reporter's Record Volume Four of March 31, 2017.
"RR(5) [page] [line]"	Refers to the Reporter's Record Volume Five of April 3, 2017.
"RR(6) State [Ex. No.]"	Refers to the Reporter's Record Volume Six specified State Exhibit.
"RR(6) [Def.] [Ex. No.]"	Refers to the Reporter's Record Volume Six specified Defendant Exhibit.
APPX [Appendix No.]	Refers to a specified Appendix Tab

INDEX OF AUTHORITIES

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POINTS PRESENTED FOR REVIEW

I. Appellee must show at a minimum that the statute's vagueness extends to his own conduct.

II. The Court must construe a statutory provision in such a manner as to avoid constitutional infirmity whenever such a reading is at least plausible—even if it is not necessarily the most evident construction.

III. The Texas Open Meetings Act does not prohibit public speech. It requires that the specified speech, regardless of viewpoint, be conducted in public.

ARGUMENT

I. Section 551.143 is not unconstitutionally vague.

The Court first holds that challenges of facial vagueness where the First Amendment is implicated go beyond the ordinary vagueness grounds by which a court

> should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A [litigant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

Hoffman specifically analyzes prior decisions requiring a "more stringent vagueness test" where First Amendment rights are implicated and unambiguously sets out that a movant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of a law as applied to the conduct of others." *Id*. at 455 U.S. at 495, 102 S. Ct. 1186. The Supreme Court reached a similar considered holding in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20, 130 S. Ct. 2705 (2010) ("That rule makes no exception for conduct in the form of speech."). That is, the scope of the relevant criminal provision may not be clear in every application. But the dispositive point is that the statutory terms are clear in their application to Appellee's conduct. *Id*. at 21.

This Court's prior holding in *Long v. State*, 931 S.W.2d 285, 288 (Tex. Crim. App. 1996), that "when a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct" stands in contravention to the U.S. Supreme Court's opinion in *Holder*. Articulating this holding was unnecessary for the result in *Long* as the case addressed a stalking statute that did not define the meaning of the terms "annoy or alarm." The statute at issue in *Long* also had no required culpable mental state in the challenged subsection.

The Court cites to two other Supreme Court opinions to hold that Appellee may nevertheless challenge Section 551.143(a) on facial vagueness grounds: *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 2560-61 (2015) and *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 1214 n.3 (2018). These cases both involved application of "residual clauses" under which punishment for certain crimes may be enhanced, which in each case, required extrapolation with no clear guide. However, the cases cited by the Court are simply not analogous to the case at bar. Neither opinion cited by the Court discusses *Holder* much less overrules it on the elemental issue of whether a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct.

In a facial challenge to the constitutionality of a statute, the requirement to show that the scope of the statute's vagueness extends to the litigant's own conduct

is properly viewed as a subset of a requirement to show that the statute is vague in all of its applications. But it is a vital element; otherwise, the Court is no longer construing the statute, but deconstructing it.

Indeed, the questions raised by the court invoke the specter that a member of a governmental body could violate § 551.143 "by accident." There is no Texas case where that has even arguably happened. There is no record in this case regarding Appellee's conduct to even analyze if the statute's purported vagueness extends to it. In both *Johnson* and *Dimaya*, appeals were taken after a trial court judgment had already been obtained. As a result, the facts underlying those cases were well known and, consequently, the courts were in a position to judge whether the vagueness of the law at issue reached as far as the cases that were presented.

Even under the Court's holding, Appellee must show the statute to be vague in at least some application. Courts are obliged to construe a statutory provision in such a manner as to avoid constitutional infirmity whenever such a reading is at least plausible—even if it is not necessarily the most evident construction. *See, e.g., United States v. Harriss*, 347 U.S. 612, 618, 74 S. Ct. 808 (1954). If construing the statute in this way saves it from a claim of facial invalidity on vagueness grounds, precedent directs that the Court should take that approach. Section 551.143(a) provides:

> A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to

> circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

Rather than a stumbling block, use of the defined term "deliberations" is purposeful. The statute's proscription of deliberations of a quorum of the governmental body is not diminished by the fact that the members are actually "meeting" in numbers less than a quorum. They are deliberating and acting as a quorum in this instance, as that term is defined by the Open Meetings Information Act definition, but in a way that is in "secret," so as to avoid the manifest requirements of a lawful quorum.

In construing this statute, the Attorney General analyzed the word "meeting" in the statute and noted that the noun form of the word "meeting" is statutorily defined, whereas § 551.143 uses "meeting" as a verb. Therefore, the technical definition of "meeting" as a noun is not implicated by § 551.143. Tex. Att'y Gen. Op. GA-0326 (2005) at 3. The Attorney General's construction is entirely reasonable and has been the touchstone for interpretation of this statute. But again, the term "meeting" here is also consistent with the statutory definition because a majority of the governmental body is actually involved in the deliberations. The very point of the statute is to govern meetings of a majority who are in fact deliberating and taking action as a governmental body.

It is with this in mind that the Texas Attorney General construed § 551.143(a), reaching the same construction of the statute by interpreting "quorum" to include the

concept of a so-called "walking quorum," whereby a majority of a governmental body meets, not all at once, but serially. Tex. Att'y Gen. Op. GA-0326 (2005) at 2.

The Court addresses the Attorney General's construction by examining various examples of a "walking quorum" as applied to different scenarios in other states under their respective open meetings acts. The number of cases addressing this show the pervasiveness of the problem of members avoiding open meetings through technical but not actual compliance with the quorum requirements. Even more importantly, not a single one of these cases cited by the Court, all of which use or reference the term "walking quorum," was resolved through a constitutional analysis, much less found to be unconstitutionally vague.

The Court set out a number of hypothetical scenarios which similarly show the breadth of application. Every one of these scenarios may be readily resolved under the interpretation of the statute as the lower courts and Attorney General have construed it with the addition of knowledge of the evidence of the culpable mental state involving an agreement to circumvent the Texas Open Meetings Act ("TOMA") by specifically involving a majority of the governing body in "secret deliberations."

The statute requires the culpable mental state of "knowingly conspiring to circumvent" TOMA for there to be a violation. A statute's inclusion of a culpable mental state does not invariably alleviate vagueness concerns, but the wording of

§ 551.143 requires proof of the actor's awareness that he is making a secret agreement with others to overcome or avoid the requirements of TOMA. The need for this level of proof is doubtless a principal reason there have been no convictions under this statute, the opposite of what one would expect of a statute that can be violated by accident. But where, as the State contends is the case here, the evidence would show the requisite mental state, the State should be able to prosecute this crime of improper conduct of governance. Any concern is substantially mitigated by the statute's inclusion of language requiring proof of the actor's guilty mind in knowingly conspiring to circumvent TOMA.

The statutory language, viewed as a whole and in the context of the remaining provisions in TOMA, is adequate to place an ordinary officeholder on notice of the prohibited conduct and to prevent arbitrary enforcement. The mere fact that it may occasionally be difficult to determine how a statute applies to a particular fact pattern does not render the statute facially vague, for "even clear rules 'produce close cases.'" *Salman v. United States*, —— U.S. ——, 137 S. Ct. 420, 429 (2016) (quoting *Johnson*, 135 S. Ct. at 2560).

In conclusion, while all would agree that our First Amendment rights are sacrosanct, the mere fact that a statute seeks to govern behavior that involves speech cannot then mean that the State is without ability to dictate in plain terms how its business will be conducted from a procedural perspective.

The issues here go to the very matter of whether or how we are empowered to govern ourselves. The Court has invalidated a statute that has been interpreted by the Texas Attorney General and courts for years with little difficulty, and for that period has been a lynchpin of Texas open government. The Court's opinion has plunged Texas government into uncertainty with even Texas Governor Abbott directing "all agencies and boards to continue to follow the spirit of the law." (APPX 1).

II. Section 551.143 does not violate the First Amendment rights of members of governmental bodies.

While the majority of the Court did not address the issue which was a principal thrust of Appellee's Motion to Dismiss, namely that it purportedly violates Appellee's First Amendment rights as a content-based statute, Justice Slaughter in her concurrence would uphold the dismissal on this ground, and there may be members of the majority who have analyzed the case similarly but did not reach the issue.

We write briefly here to state that, to the extent the case of *Reed v. Town of Gilbert, Ariz.*, —— U.S. ——, 135 S. Ct. 2218 (2015), actually did overturn years of First Amendment precedent, and to the extent a violation of the statute at issue actually involves speech and not conduct in violation of mandated procedure, *Reed* is clearly distinguishable as dealing with a public forum whereas § 551.143(a) regulates only the private speech of governmental body members. *See Asgeirsson*

v. Abbott, 696 F.3d 454, 461 (5th Cir. 2012) ("The prohibition in TOMA is applicable only to private forums and is designed to encourage public discussion.").

If *Reed* means that the State may not ban "walking quorums" without reference to a governmental body member's particular view of whatever public business he or she may wish to debate or discuss outside of the Act's requirements, then the State is not only without power to prevent a quorum of members from communicating in numbers less than a quorum while still acting as a quorum, it is without power to enact any kind of open meetings act. The very nature of such legislation must target discussions regarding the business of the governmental body. If not, under any First Amendment standard of review, the statute will be overbroad. Such an interpretation of the holding in *Reed* overturns *Asgeirsson* which recognized that TOMA does not prohibit public speech at all—it requires that the specified speech, regardless of viewpoint, be conducted in public. *Id.*

CONCLUSION

The Court's holding on vagueness grounds strikes as deeply as if the Court had overturned § 551.143 as a "content-based" statute in violation of the First Amendment. While the Court expresses its confidence that the Legislature can craft a new statute that will pass constitutional muster, the Legislature should not have to play a guessing game to find acceptable magic words when a reasonable interpretation of the statute clearly dispels any concerns of constitutional infirmity.

The Court's analysis on the meaning and use of the term "walking quorum" and its several hypotheticals leaves any language the Legislature may draft on uncertain terrain, and doubtless leaves any subsequent statute only that much more likely to be challenged.

Appellee's own expert testified that the Attorney General's formulation of the meaning of the statute was "the only way to read it to be reasonable." (RR(3) 173, 19-21). The Court must follow Supreme Court precedent and give Tex. Gov't Code § 551.143 this reasonable interpretation.

PRAYER

A nation founded on the principle of government of the people, by the people and for the people necessarily requires that government be conducted in view of the people. This theory of government runs back to our founding fathers and is the bedrock on which this nation is built. The First Amendment supports this right of the people for open, limited government and the Texas Open Meetings Act was passed to provide a legislative framework to ensure that governmental bodies in Texas meet their constitutional duty to do business in the light of day.

Appellee's arguments and his witnesses' testimony do not raise a successful facial challenge to Texas Government Code section 551.143, a keystone provision of the Texas Open Meetings Act.

Appellant prays the Court to grant its motion for rehearing, to enter an opinion reversing the trial court's order dismissing this case, and for all other relief to which it may show itself entitled and as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 29, 2018, I caused to be electronically filed the foregoing Motion with the Clerk of the Court through an electronic service provider which will send notification of such filing to all counsel of record as noted below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was prepared using Microsoft Word in Times New Roman, 14-point font; the word-count function shows that, excluding those sections exempted under TRAP 9.4(i)(1). The brief contains 2,322 words.

/s/ Joseph R. Larsen
Joseph R. Larsen

No. PD-0254-18

IN THE TEXAS COURT OF CRIMINAL APPEALS

CONSOLIDATED PROCEEDINGS

CRAIG DOYAL, CHARLIE RILEY AND MARC DAVENPORT

Appellees,

VS.

THE STATE OF TEXAS

Appellant.

ON DISCRETIONARY REVIEW FROM THE NINTH COURT OF APPEALS DISTRICT OF THE STATE OF TEXAS

CAUSE Nos. 09-17-00123-CR, 09-17-00124-CR & 09-17-00125-CR

APPENDIX

Description **Tab**

TAB 1

GOVERNOR GREG ABBOTT

February 28, 2019

Re: Court of Criminal Appeals ruling on Open Meetings Act

Dear Appointees and State Agency Heads:

Texans place significant trust in their elected and appointed officials. With this trust comes the expectation that officials will conduct public business responsibly and in accordance with the law. One such law is the Texas Open Meetings Act, which represents a commitment to the citizens of Texas that the public's business will be conducted out in the open. Texas has long been, and will continue to be, a leader in governmental transparency.

Although the Texas Court of Criminal Appeals has today declared Section 551.143 of the Texas Open Meetings Act unconstitutional, all other provisions of that statute remain valid and binding.

Regardless of yesterday's ruling, my standard and expectation is for all agencies and boards to continue to follow the spirit of the law. You should not waver in your commitment to providing transparency in the work you perform for Texans at your respective governmental entities.

Sincerely,

Greg Abbott
Governor

GA:ack